

ENVIRONMENTAL LAW

OVERVIEW

*DLA does not routinely control active sites that could expose it to liability as a responsible party. It does administer contracts, and during or long after contracts have been performed, contamination can be discovered. The FAR requires us to report violations of environmental law when we become aware that they exist. This does not mean that DCMC personnel will assume the role of policeman or polluter. To the contrary, it means that if, in the normal performance of duty, information comes into our possession that establishes that there has been a violation, we have a duty to report. Each of the words in the preceding sentence has serious legal implications Under **no circumstances should any DCMC element proceed to notify environmental regulators without first trying to contact DLA-GC or appropriate DCMC counsel.** DCMC is mostly going to be responsible for determining who will pay and how much if performance of the contract caused contamination. Therefore, there are many environmental issues that are of interest to the contract administrator, but normally there is little that touches contract administration except cost recovery or allocation. This summary will describe basic issues and designate a few issues directly related to administration.*

Environmental issues must be viewed in a scientific and political context and in a legal context

- SCIENTIFIC CONTEXT:

- Many environmental conditions and catastrophes are beyond human control; however, this has not stopped Congressmen and regulators from attempting to regulate the environment.
- Many laws are based on imperfect scientific foundation. However, there was political and legal consensus that action was needed, even if the action is not totally scientifically sound.

- POLITICAL CONTEXT:

- Environmental Laws have partially been enacted in a "knee-jerk" response to public reaction to a major environmental event or disaster
- Examples:
 - Cuyahoga River fire (1969) led to Clean Water Act
 - Love Canal (New York) neighborhood was built on an old toxic waste dump, which led to Superfund law, which addresses cleanup of past contamination
 - Toxic chemical release by Union Carbide plant in India (1986) led to the Emergency Planning and Community Right to Know Act
 - Thinning ozone layer and acid rain led to amended Clean Air Act (1990)
- For obvious political and religious reasons, laws do not always address the biggest environmental problems, such as heavy resource consumption and overpopulation

As a matter of policy, DLA is committed to supporting environmental laws and regulations, even when not required by law to comply.

- Environmental costs are increasing at the same time that budget and manpower are shrinking.
More of the money DLA administers is going for clean up.

PLANNING LAWS and POLLUTANT LAWS

PLANNING LAWS impose restrictions on the ability of federal agencies to implement decisions that adversely affect the environment.

The most familiar planning statute that controls governmental decision-making authority is the National Environmental Policy Act (NEPA) which requires the proponent agency to:

- Use an interdisciplinary approach to planning for decisions that impact the environment.
 - Study alternatives for all actions that involve unresolved conflicts over the use of resources.
 - Prepare environmental impact statements for all major federal actions significantly affecting the quality of the human environment.
 - Give environmental concerns appropriate consideration in the planning process.
- As a practical matter, DCMC usually is not the proponent agency for programs it oversees. However in cases where DCMC actually begins a project, we become responsible for the study, even if our contractor actually does the work. NEPA is a rare example of a requirement imposed **solely on federal agencies** to implement decisions with specific types of environmental impact. For example:
- The Endangered Species Act forbids governmental actions that threaten endangered species or critical habitats.
 - The National Historic Preservation Act and related statutes require agencies to identify certain historic sites and objects under its control and to take actions to preserve historical and archaeological data under some circumstances.

POLLUTANT LAWS establish pollution control regulations that apply to government agencies and other governmental agencies as well as to private parties.

A partial list of the areas that federal statutes now address includes:

- Air quality (Clean Air Act - CAA)
- Water pollution (Clean Water Act - CWA; and the Safe Drinking Water Act - SWDA)
- Noise (Noise Control Act - NCA)
- Hazardous wastes (Resource Conservation and Recovery Act - RCRA; and the Comprehensive Environmental Response, Compensation and Recovery Act - CERCLA)
- Toxic substances (Toxic Substances Control Act - TSCA)
- Pesticides (Federal Insecticide, Fungicide, and Rodenticide Act - FIFRA)

Environmental law is an area where delayed action may cost thousands or millions of dollars and may seriously hamper a facility's ability to perform its mission.

- We can, however, usually overcome environmental problems that would compromise our customer's programs **if** those problems are quickly identified and brought to the attention of individuals with the appropriate expertise. It is critical that the advice of legal counsel be obtained as early as possible.

PRIVATE FACILITY COMMANDER'S LIABILITY

Facility Commanders work under the threat of personal liability, and a brief description of their environment is expected to be of value. (Note: DCMC Commanders are NOT facility/installation commanders) tc "ENVIRONMENTAL LAW; COMMANDER'S LIABILITY" PRIVATE

- All the pollution abatement statutes (e.g., Air, Water Hazardous Waste) can impose civil and criminal penalties.
 - These can be enforced by federal or state agencies
- Military members and civilian employees are generally exempt from civil or administrative penalties.
 - Regulators would instead seek civil penalties from the Agency.
- Government contractors and their employees are subject to civil, criminal, or administrative penalties
- The situation is evolving as to criminal liability.
 - Traditionally, criminal liability has attached in environmental situations which involved criminal intent or wanton disregard of law or public safety
 - Recently, enforcement agencies (including Department of Justice (DOJ)) involved in hazardous wastes and control of hazardous substances have sought to reduce the "wanton" threshold to a "benign neglect" standard for supervisory personnel
 - DOJ has also enunciated a "responsible corporate officer doctrine"; under this doctrine, high-level supervisory personnel can be held criminally responsible for the acts of subordinates where the supervisor exercises control over the activities giving rise to the violation, **despite an apparent lack of knowledge regarding the specific violations.**
 - Having created this policy, DOJ has stated that it does not intend to pursue criminal convictions based solely on one's corporate or command position
- On 23 February 1989, the US District Court for the District of Maryland found three Army civilian employees (an SES-4, GS-15, and GS-14) guilty of storing and disposing of hazardous wastes in violation of the Resource Conservation and Recovery Act (RCRA) at the Aberdeen Proving Ground; they were sentenced to three years probation on 12 May 1989. US v. Dee
 - This case set precedent, which has been followed, for criminal prosecutions of military personnel. Regulators viewed this case as one to be emulated where federal facilities refuse to comply with environmental laws
 - The defendants were accused of storing, treating, and disposing of a variety of hazardous wastes from 1983 through 1986 without permits in knowing violation of RCRA and Army regulations
 - The defendants were found guilty based on their responsibilities under RCRA and Army regulations to obtain permits and supervise those who handled the waste; on their personal knowledge of the RCRA violations; and on their failure to respond, when repeatedly warned, that their failure to obey RCRA violations did cause harm to the environment

- The Department of Justice did not provide attorneys to represent these defendants, and forbade the Army from providing defense attorneys at the Army's expense; attorneys fees reached a total \$250,000
- The message of Aberdeen goes beyond hazardous waste since most environmental protection laws have similar criminal provisions where penalties include prison and monetary penalties:
 - Clean Air Act (CAA -- 42 U.S.C. § 7401)
 - Federal Water Pollution Control Act (FWPCA -- also called the Clean Water Act -- 33 U.S.C. § 1251)
 - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA -- amended by the Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. § 9601)
 - Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA -- 7 U.S.C. § 136)
 - Toxic Substances Control Act (TSCA) -- controls PCBs -- 15 U.S.C. § 2601)
 - Safe Drinking Water Act (SDWA -- 42 U.S.C. § 300f)
- Since Aberdeen, there have been more DOJ prosecutions of Federal employees for environmental offenses, for example:
 - Army civilian manager of Fort Meade wastewater treatment plant convicted of nine felony counts for violating permit and falsifying reports; sentenced to eight months in jail. US v. Pond
 - Navy manager of exchange auto repair facility convicted of illegal dumping of radiator fluid containing antifreeze; sentenced to one year probation and \$500 fine. US v. Bond
 - Sewage treatment plant foreman (civilian) at March AFB convicted of falsifying records; sentence was \$5,000 fine and 18 months in jail, both suspended. Calif. v. Hernandez
 - Three Army civilians (two GS-12, one GS-11) at Fort Benning, GA, indicted for violations of the Endangered Species Act and making false official statements. Two were placed in pretrial diversion and ordered to pay a \$1500 civil penalty; charges against the other were dropped. US v. Three Employees
- Proof considerations
 - Knowledge can be established by **direct** evidence, as where an individual has been specifically told of the violation in issue; or by **circumstantial** evidence indicating that the individual should have been aware of deficiencies, given her knowledge and training, and failed to take appropriate action - Factors DOJ considers in deciding whether to prosecute
 - Voluntary disclosure of violation before the regulators found out
 - Cooperation with regulators
 - Good faith self auditing program - i.e. ECAMP
 - Internal disciplinary action (underused to date)
 - Subsequent compliance efforts, such as serious ECAMP follow-up

- How to stay out of trouble,

- Document efforts to comply
- Promote environmental ethic (train and discipline)
- Your defense against being charged for active, knowing participation in illegal activities is quite simple: obey the law, or if you are in violation, work with your federal and state environmental regulators to get into compliance with the law
- Your defense against being charged for a violation of the law in your role as a supervisor is **vigilance**: keep informed about what is going on environmentally on the base; consult with legal counsel on matters of environmental compliance
- Read closely any certifications as to truth and accuracy that on any documents that are submitted to regulators over your signature

- BOTTOM LINE

- If you can honestly say that you meet the above standards in your day to day dealings, then you're probably safe from being prosecuted for environmental law violations.

Attachment: Synopsis of Penalties

References:

United States v. Dee, 912 F.2d 741 (4th Cir. 1990)
United States v. Pond, Cr. S-90-0420 (D. Md. Apr. 17, 1991)
United States v. Bond, Cr. 91-0287-GT (S.D. Cal. Apr 9, 1991)
California v. Hernandez, No. 25148 (Riverside Mun. Ct. May 11, 1992)
United States v. Three Employees, Cr. No. 92-117-COL (JRE) (M.D. Ga. 1993)

Maximum Penalties for Violating Federal Environmental Requirements

| <u>STATUTE</u> | <u>CIVIL PENALTY</u> | <u>CRIMINAL PENALTY: Willful or Negligent Violation</u> | <u>CRIMINAL PENALTY: Withheld or Falsified Information</u> |
|---|---|--|---|
| Clean Air Act | Administrative Penalty: Up to 200K Field Citations: \$5.5K Injunctions | | Fines of up to \$250,000 and 5 years in prison |
| Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) | 27.5 K: 1st \$82.5K: 2nd | 5 Years in prison | 5 Years in prison |
| National Environmental Policy Act (NEPA) | Injunction | N/A | N/A |
| Resource Conservation and Recovery Act (RECRA) | \$27.5 K per Day Injunction | \$50K per day 2 Years in Prison (first offense) \$100K per day 4 Years in Prison (subsequent offense) \$250K*** 15 Years in Prison (knowing endangerment) | \$27.5 K per day 1 Year in Prison |
| Federal Insecticide, Fungicide, and Rodenticide Act | \$1K** | \$1K 1 Month in Prison | N/A |
| Toxic Substances Control Act | \$27.5 K per day Injunction | \$27.5 K per day 1 Year in Prison | N/A |

* Amounts do not include additional award of attorney fees

** Injunction may be granted if suit is brought under the Administrative Procedures Act

*** Organizational defendants may be fined up to \$1 million

PRIVATE HANDLING A PRIVATE to "HANDLING A PRIVATE"
NOTICE OF VIOLATION (NOV)

Although the DLA is not likely to be responsible for the handling of a NOV, the concept should be described for general reference.

- The NOV process is an administrative enforcement mechanism used by a regulatory agency.
 - Used to provide notice of noncompliance with either statute or regulation
 - Can be issued by both federal and state agencies
 - Available in all environmental statutes (RCRA, CAA, CWA)
- NOVs are often issued after an inspection by a regulatory agency.
 - Inspection can be with or without notice
 - Expect more inspections in future, as regulators become more assertive
- NOVs can also be issued without an inspection.
 - Based upon reports filed with DLA (effluent limitations, spills, etc.)
 - Failure to report can result in NOV
- NOVs must receive priority treatment.
 - Make appropriate notifications to higher headquarters
 - NOVs can be a preliminary step toward litigation, which can mean court orders and penalties for subsequent violation of court orders
 - may seek injunction to shut down operations
 - "Knowing" violations can lead to criminal penalties (jail and fines)
 - Can lead to more inspections by regulators
- For Toxic Substances Control Act (i.e., relating to the removal of lead-based paint) and RCRA NOVs, U.S. EPA and states may assess fines and penalties against a federal agency for violations. Contractors are even more exposed to fines and penalties than federal agencies. The following discussion assumes U.S. EPA proposed penalties.
 - The EPA "complaint" triggers a very formal administrative process
 - Must file answer within 20 days; failure to respond to any given allegation is an admission of its truth
 - Ensure that a coordinated effort is made to preserve evidence and document site conditions, as it may be some time before you get to the hearing
 - Pursue settlement efforts while pending hearing

- NOVs are avoidable and manageable.
 - Be prepared for inspections by regulators
 - treat inspections same as operational readiness inspections
 - know your weak areas and make sure the contractor knows his work areas
 - Conduct pre-inspection
 - Complete "easy fix", don't wait to be directed
 - "Neatness" really does count
 - Select and brief escort team to go with inspectors
 - Know the areas in RCRA, for example, most likely to produce violations
 - Hazardous waste management plans
 - Personnel training records
 - Documentation of "cradle-to-grave" management of hazardous waste, to include return manifests showing that wastes destined for disposal sites arrived there
 - Labeling and condition of hazardous waste barrels
 - Security
 - Contingency plans and emergency procedures
 - Air and water discharge monitoring reports (compare to permit limitations)
 - The above should remain the responsibility of the contractor subject to agency monitoring.
 - Even more important advance planning should make it abundantly clear to the contractor that he must
 - Immediately notify contracting officer upon receipt of NOV and
 - Cooperate to the fullest extent in all matters relative to final resolution
- If you get a NOV use all available help to resolve.
 - Notify others at higher organizational levels, especially legal counsel
 - Cooperate with regulating agency
 - Use available resources
 - Other offices can help (experience, interpretation, advice)

- Timely response imperative

- Regulators may propose a Compliance Agreement; if so, involve legal counsel immediately and **NEVER SIGN A COMPLIANCE AGREEMENT** without general counsel coordination

- **Bottom line**

- DLA generally has no operator or ownership role, and thus is not normally named in a Notice of Violation

- Preparation is the key to avoiding NOVs

- Prompt, cooperative action is the key to resolving NOVs